SERVED: October 19, 2001

NTSB Order No. EA-4916

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of October, 2001

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. PAUL FRANKLIN OSTROVE, Respondent.	Docket SE-15600

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, rendered on September 1, 1999, at the conclusion of a two-day evidentiary hearing.[1] By that decision, the law judge affirmed the Administrator's order revoking respondent's Airline Transport Pilot (ATP) certificate. The order (complaint) alleged that

[1]A portion of the transcript containing the initial decision is attached.

respondent acted as pilot-in-command of a Cessna 177 on a passenger-carrying flight with insufficient fuel to meet the regulatory minimums, that the aircraft crashed short of its destination due to fuel exhaustion, and, further, that respondent intentionally falsified his logbooks and other documents to make it appear as if he had received a pilot competency check when, in fact, he had not.[2] For the reasons discussed below, we deny the appeal.[3]

Respondent's appeal is confined to a very narrow issue. He argues that a discovery ruling made by the law judge was an abuse of discretion culminating in a denial of his Constitutional due process rights, "in that he was forbidden from presenting even a modicum of defense." Respondent's brief at 4. We find respondent's argument, not only exaggerated, but unavailing.

During the weeks before the scheduled hearing, a variety of discovery spats developed between respondent's counsel and the Administrator's counsel. For example, with the hearing scheduled

[2]The order, attached as Appendix A, charged respondent with violations of sections 61.56(c) (Requirement that a pilot-in-command have had a flight review within the last 24 months and have an endorsement in his logbook from an authorized instructor); 61.59(a)(2) (Prohibition against making any intentionally false entry in a logbook or record required to be kept); 91.151(a)(2) (Fuel requirements for VFR flight at night enough to reach intended destination plus 45 minutes); 91.167(a) (Fuel requirements in IFR conditions – enough to reach first intended airport, alternate airport, plus 45 minutes); and 91.13(a) (Prohibition against operation of an aircraft in a careless or reckless manner so as to endanger persons or property) of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 61 and 91.

[3]Respondent filed a brief on appeal and the Administrator filed a reply.

for August 31, 1999, and after assuring the Administrator's counsel on July 14, 1999 (34 days after receiving the request), that the discovery responses would be forthcoming in one or two days, respondent's counsel, on July 15, 1999, left a voicemail informing the Administrator's counsel that he would be out of town on vacation for three weeks and would send the discovery responses upon his return.

The Administrator then filed Motions to Compel Responses to her First Discovery Request on July 22, 1999, and Second Discovery Request on July 29, 1999. The law judge ordered respondent to reply to the motions by August 6, 1999, and August 10, 1999, respectively, then granted his request to allow both to be filed on August 10, 1999.

Respondent replied to the motions on August 9, stating that counsel would provide some requested documents the following day and respond to all other requests by August 17. On August 10, respondent produced one of two original pilot logbooks. The second (his so-called "mini-logbook"), although promised, was never produced.

By order dated August 10, 1999, the law judge stated that the Administrator must file any clarifying requests for admission or interrogatories by August 12th (which the Administrator did) and respondent must reply to those by August 19. He further ordered respondent to serve his outstanding discovery responses by August 17.

In an order dated August 16, 1999, the law judge required

that all discovery, responses, and exchange of witness and exhibit lists be completed by August 23. Respondent served his discovery responses on August 19. The Administrator, however, deemed them incomplete and evasive and, as a result, filed a Motion for Evidentiary Sanctions the same day. The law judge ordered respondent to file a reply by August 23.

On August 31, 1999, before the hearing began, the law judge ruled on the Motion for Evidentiary Sanctions.[4] He discussed how discovery is a useful tool for both sides to prepare for hearing and that the responses to a discovery request must be "fair,… complete,… and accurate." Transcript (Tr.) at 4. He noted that the Administrator's request for admissions asked that any qualified admission or denial include all facts upon which the answer is based. The law judge found some of respondent's answers to be incomplete: specifically those where respondent referred only to his belief that the aircraft had sufficient fuel for the flights and his belief that he had completed a biennial flight review, without any elaboration for the bases of those beliefs.[5] As a consequence, the law judge ruled that the

[4]The law judge's ruling, an excerpt from the hearing transcript, is attached as Appendix B.

[5]For example, Admission No. 1 asked for an admission to the following charge in the complaint:

"The statement, under penalty of perjury, dated, September 15, 1998, which was submitted to Citrus Investigation and Adjustment Company, certifying that you received a pilot competency check (PC) on December 16, 1996, is an intentionally false statement." Complaint, Paragraph 6.

Respondent denied this admission and, when asked to explain,

respondent would be permitted to testify to his belief *only*, but not to any discussions or circumstances surrounding the subject of the interrogatories to which he gave evasive answers. Tr. at 6-8. Additionally, the law judge noted these evasive and incomplete responses were filed within a week of commencement of

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responded:

"I believed that I had received a competency check based upon discussions I had with Mr. Weichert and circumstances surrounding the flight." Respondent's Response to Interrogatories, August 17, 1999, at 1.

Mr. Weichert, the Chief Pilot for Air 21 (respondent's former employer), later testified at the hearing that he did not give respondent a proficiency check or flight review in December 1996, and that he did not do anything that would have led respondent to believe he had received a proficiency check. Tr. at 55, 93.

The Administrator sought admissions regarding the alleged false entry in respondent's logbook, and the allegation that he operated an aircraft when he had not fulfilled the flight requirements of FAR section 61.56. The responses provided were virtually identical to the response quoted above. Respondent's Response to Interrogatories, August 17, 1999, at 1.

Respondent was asked to admit that, "[a]t the accident scene of N177GS, there was no smell, odor, or evidence of fuel." He denied this statement and, when asked to explain, stated, "I was not concentrating on any odor or smell or evidence of fuel. I was just in an airplane crash and my only concern was the other people on board the aircraft." Id.

The Administrator also asked respondent to admit that, prior to the accident flight, the aircraft's fuel tanks were less than half full and that he began his flight with insufficient fuel to reach the intended landing site plus fly an additional 45 minutes. Respondent denied the statements, saying that he had "insufficient information as to what the FAA file contains," and that he knew "there was sufficient fuel for our flight, plus reserves." Id. at 2.

The law judge precluded respondent from testifying on the subject of the presence or absence of fuel at the accident scene except to say that he has no knowledge of the subject. Tr. at 8-

the hearing and that deprived the Administrator's counsel of the opportunity to prepare for cross-examination or rebuttal. As a consequence, he deemed admitted the allegation that respondent operated an aircraft in IFR conditions without sufficient fuel to reach the intended destination plus 45 minutes. Tr. at 12.

Respondent argues on appeal that the law judge's order of August 10, 1999, did not require "complete responses," but rather simply required that he "file and serve his responses" and, therefore, he did not violate the order. Respondent's Brief at 5-6. This argument attempts to make a mockery of the discovery process. Implicit in an order to file and serve discovery responses is the understanding that the responses will be executed correctly, i.e., completely. Anything less reduces discovery from a tool for trial preparation into a game of wordplay and surprise.

A law judge has considerable discretion to deal with discovery issues. See Administrator v. Scott, NTSB Order No. EA-4572 at 5 (1997); Administrator v. Bailey and Avila, NTSB Order No. EA-4294 at 9 (1994), and cases cited therein.[6] In the

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9.

[6]In Scott, NTSB Order No. EA-4572 at 5, we stated:

> The law judge was clearly well within his discretion in declining to permit respondent to adduce at the hearing evidence that he had inexplicably failed to produce in discovery, for aside from the fact that it would have been patently unfair to let respondent gain an advantage by disregarding his discovery obligations, the Administrator would have been prejudiced because his ability to effectively cross examine respondent on a subject clearly identified in discovery, and to

instant case, the law judge observed that the Administrator's counsel would have been prejudiced had respondent been permitted to flout the discovery process and prevent adequate preparation for trial. Respondent chose not to testify and made no proffer of what evidence he would have offered but for the preclusion order. Consequently, we have no way of knowing what evidence, if any, he was precluded from offering at trial.

Finally, respondent argues that the evidentiary sanction was too severe. Instead, he asserts, the trial should have been continued, allowing for an interlocutory appeal and that, in any event, the Administrator's case was not prejudiced by his discovery responses. Again, the law judge's decision to issue evidentiary sanctions rather than choose another option is committed to his sound discretion. We remain unconvinced that he abused his discretion in this instance.

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develop and present evidence in rebuttal, if necessary, had been significantly compromised by the lack of an opportunity before the hearing to evaluate and investigate the assertions underlying respondent's affirmative defense.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The revocation of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.[7]

CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. BLAKEY, Chairman, did not participate.

[7]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).